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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 305

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; OREGON ELECTRIC RAILWAY COMPANY; OREGON TRUNK RAILWAY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO ROCK ISLAND AND PACIFIC RAILROAD COMPANY; and THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,

Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin

BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM.

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BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM.

Motions to affirm the judgment of the District Court have been filed by the United States of America and Interstate Commerce Commission (Government appellees), and by the appellee railroad companies (Railroad appellees).

I. STATEMENTS.

Government appellees imply that the only purpose of the Milwaukee's complaint to the Interstate Commerce Commission was "to enable the Milwaukee to share in bridge traffic" (p.[1] 2). The Railroad appellees contend that the Milwaukee's complaint "affects only 'bridge traffic' as to which the Milwaukee seeks intermediate routes, and traffic moving to or from common points reached also by the Northern Lines or their connections." (p. 4). "Bridge traffic" is traffic which moves over, but neither originates nor terminates on, the Milwaukee.

Both the implication and the contention are erroneous, for, as admitted by the Commission at 300 I.C.C. 453, 455:

> "[The Milwaukee] seeks the establishment of joint through rates from and to *points served exclusively by it,* as well as common points; and points reached by connecting lines." (Emphasis supplied).

Furthermore, the evidence establishes that of the 6384 cars per year of S.P.& S. traffic handled by the Milwaukee, the Milwaukee was short hauled 5871 times or approximately 92 per cent of such traffic, at an annual revenue loss of over 2.5 million dollars. Of the 5871 cars, 3308, or 60 per cent, were originated or terminated by the Milwaukee. (300 I.C.C. 453, 460, 461, 473; Ex.[2] 1).

It should be clearly understood, therefore, that the Milwaukee seeks relief for itself and its shippers, not only with respect to bridge traffic over the Milwaukee, but also traffic originating or terminating on the Milwaukee at all points, whether served exclusively or in common with other railroads.

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[1] Page numbers, unless otherwise specified, refer to the pages of the respective motions to affirm.

[2] Ex. refers to exhibits introduced in the hearing before the Commission.

II. QUESTIONS PRESENTED.

The Government appellees agree with the Milwaukee that the question—whether a railroad is operated under common management or control with another railroad within the meaning of Section 15(4) of the Interstate Commerce Act when it is operated under the joint management or control of two railroads—is one of first impression before the courts (pp. 4, 5). Aware that millions of dollars a year in freight revenues and the rights of numerous shippers to select without rate penalty the route of a major freight hauler turn upon this question, Government appellees willingly avoid a discussion of its importance. (p. 5). Thus no basis for granting a motion to affirm, *i.e.*, that the question is frivolous or well settled, is here presented. *Cf. Zucht* v. *King* (1922) 260 U.S. 174.

Government appellees refer to the District Court's statement that "there has been no sound reason, economic or otherwise, advanced why two joint owners are not any less in need of long haul protection than a single railroad which controls a subsidiary." (pp. 5, 6). Neither the Great Northern nor its competitor, the Northern Pacific, today enjoys the exclusive long haul rights to S.P.& S. traffic. Whenever S.P.& S. traffic moves over one of the Northern Lines, the other is necessarily short hauled, since all such traffic is admittedly competitive between them (Tr.[3] 2915)

This is most sharply illustrated by *Helix Milling Co. Inc. v. Great Northern Ry. Co.* (1952) 287 I.C.C. 77, cited

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[3] Tr. refers to the transcript of testimony before the Commission.

by Government appellees (p. 6). Joint rates[4] were sought therein on wheat via the Great Northern from certain points in Montana to Spokane; thence the Northern Pacific to Pasco, Washington; thence the S.P.& S. to Portland. The Northern Pacific was agreeable to establishing the rates, but the S.P.& S. and the Great Northern vigorously resisted, claiming the short haul protection of Section 15(4) against the Northern Pacific. Notwithstanding, the Commission required their establishment. Hence, the contention by the Government appellees (p. 6) that the intensely competitive Northern Lines are jointly a "carrier" which controls and manages the S.P.& S. and that each is entitled to short haul protection is pure fiction, impossible of attainment.

The Commission (300 I.C.C. 453, 470, 471), the Government appellees (p. 7), and the Railroad appellees (p. 8) place strong reliance upon *Louisville & Nash. R.R. Co.* v. *United States* (1916) 242 U.S. 60, in which Section 15(4) was not an issue. Instead, it was alleged that the L. & N. and the N.C.&St.L. Ry. were discriminating by their refusal to switch cars for the Tennessee Central at Nashville while at the same time switching for each other. The Commission in *City of Nashville* v. *L.& N. R.R. Co.* (1915) 33 I.C.C. 76, found this refusal a violation of Section 3 of the Act prohibiting such discrimination.

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[4] The essential feature of a joint rate is that connecting railroads have agreed to carry traffic from points on one road to points on the other for an aggregate charge which is less than the sum of their local charges between the same points. Without such agreement or consent, neither road has authority to name or allow a lower through rate than a combination of their local rates. **New Haven Railroad v. Platt**, 7 I.C.C. 323, 333.

Section 3, however, then provided that the Act "shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business." This Court, by a bare majority, proceeding on an assumed premise that this protection extended to joint owners as well as single owners of terminal facilities, found that the L. & N. and the N.C.& St. L. were for practicable purposes joint owners, and held their refusal to handle cars for the Tennessee Central over such terminal facilities was not a discrimination prohibited by the Act.

Four justices took strong exception to this interpretation of Section 3 by the majority and pointed out that unless corrected by remedial legislation, it would open a wide door to discriminatory practices repugnant alike to the letter and spirit of the Act. Congress responded by removing the protection not merely from joint owners of terminal facilities, but from single owners as well (91 Stat. 479).

This case differs materially from the present case as follows:

1. The terminal facilities at Nashville were owned respectively by the L.& N.; N.C.& St.L.; and Nashville Terminal Company. The L.& N. had individual control over each of the other owners through ownership of 71 per cent of the stock of the N.C.&St.L. and 100 per cent of the stock of the Nashville Terminal Company. In this case neither of the owning lines, the Great Northern or the Northern Pacific, has any control over the other, or individual control of the S.P.& S.

2. Switching operations over the terminal facilities were conducted at Nashville by the L. & N. and N.C.&

St.L. jointly, which operation, called the "Nashville Terminals", was simply an unincorporated organization of the two companies. Against this legal nonentity no order could nor did issue. The S.P.& S. System railroads, on the other hand, the prime defendants in this proceeding, are three railroads each with a carefully maintained corporate identity, each subject to the Act, and against which lines, and not their joint owners, relief is sought.

The District Court, therefore, understandably avoids reliance upon the L.& N. case, stating:

> "Thus, *if it could be said* that the *Louisville* decision is controlling on the question of discrimination in the present case, *which issue this court does not decide, however,* it would seem to follow that the S.P.&S. is under the common management and control of the Northern Lines within the meaning of Section 15(4) because of the relationship between that statute and Section 3(4)." (Emphasis supplied).

Government appellees try to avoid the impact of *Absorption of Switching Charges of Alton and S.R.R.* (1929) 157 I.C.C. 129, and *Manufacturers Ry Co.* v. *Ahnapee & W. Ry. Co.,* (1931) 172 I.C.C. 554, the only previous cases involving a claim of protection under Section 15(4) by joint owners of a railroad. They argue that under a judicial anti-trust decree, the owned railroad "was permitted to exist and continue as a lawful unification of terminal facilities for the interchange, collection and distribution of traffic *of all railroads* desiring to use its facilities upon equal terms, regardless of whether they were or are proprietary or nonproprietary companies. See 172 I.C.C. at 560." (p. 9, footnote 4).

The firm intention of this Court that such decree was not to interfere in any way with the Interstate Commerce Act or to affect the Commission in exercising its powers with respect to joint rates or through routes over the Terminal Railroad is expressed in its mandate to the District Court:

> "Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission." *United States* v. *St. Louis Terminal* (1912) 224 U.S. 383, 412.

Three year later in *United States* v. *St. Louis Terminal* (1915) 236 U.S. 194, 209, this Court repeated, as eliminating need for any further consideration of the subject, the quoted paragraph.

Thus the Commission, contrary to the implication by Government appellees, was not constrained in its interpretation of Section 15(4), or in the exercise of its powers thereunder, by the judicial decree.

The Milwaukee's jurisdictional statement herein and that of the Secretary of Agriculture in No. 307 present another substantial question to this Court, *i.e.*, whether through routes already exist, making inapplicable the short haul restrictions of Section 15(4). Additional substantial questions are submitted relating to the correctness of the Commission's holdings under Sections 1(4), 3(1), 3(4), 15(3) and 15(4) of the Act.

None of the appellees' arguments warrant further attention other than the attempt by the Government appellees to

paint this proceeding as simply a Milwaukee undertaking in which the shipping public has little or no interest. Joining with the Milwaukee as interveners in support of its complaint to the Commission, were the Secretary of Agriculture of the United States; Western Forest Industries Association; National Livestock Producers Association; Chicago Producers Commission Association; American National Cattlemen's Association; National Wool Growers Association; and Traffic Bureau of Sioux Falls, South Dakota. Thirty-six commercial witnesses appeared at the hearing to testify to a need for joint rates via the Milwaukee, including one who had complained to the Oregon Public Utilities Commission of the rate penalty which he incurs in the use of the Milwaukee's routes for lumber from S.P.&S. origins, and another witness on behalf of numerous retail lumber dealers in the Midwest whose statement was practically the same as a complaint which he intended to file before the Commission (Tr. 392, 393, 874).

Respectfully submitted,

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